

NOT FOR PUBLICATION

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

WILL JONES,

Plaintiff,

v.

DAILY NEWS PUBLISHING CO. INC.,
INNOVATIVE COMMUNICATION CORP.
and LOWE DAVIS,
Defendants

CIVIL NO. 1999/138

TO: Lee J. Rohn, Esq.
Kevin Rames, Esq.
Henry C. Smock, Esq. - Fax 777-5758

ORDER GRANTING THE DAILY NEWS' MOTION TO
DISQUALIFY PLAINTIFF'S ATTORNEY

THIS MATTER came for consideration on Defendant, Daily News Publishing Co. Inc.'s (Daily News) Motion to Disqualify Plaintiff's Attorney. Plaintiff filed opposition to the motion and Daily News filed a reply to such opposition. Because the determinative facts are not contested, no hearing is required.

The Daily News' motion asserts that Plaintiff's attorney, The Law Offices of Lee J. Rohn, (hereafter Attorney Rohn),¹ has incurred an impermissible conflict of interest through representation of Plaintiff in this matter while also representing Andy Gross against Daily News Publishing Company,

1. It is undisputed that Attorney Rohn is the embodiment of the firm for purpose of this motion.

Inc. in Territorial Court, St. Croix, Civil No. 376/99.² In particular Daily News contends that:

1. Andy Gross was terminated from his employment at the Daily News by letter dated June 6, 1999 written by Acting City Editor, Will Jones (Exhibit "C" to Daily News' reply).
2. On June 24, 1999, Attorney Rohn filed a complaint on behalf of Andy Gross against Daily News (Terr. Ct. Civ. No. 376/99).
3. Attorney Rohn represented Plaintiff Will Jones with regard to his claims of discrimination against Daily News as early as February 26, 1999 (Exhibit "B" to Daily News' reply).
4. On August 18, 1999, Attorney Rohn filed the Complaint in this matter on behalf of Plaintiff, Will Jones.
5. Attorney Rohn continues to represent Jones and Gross.

Daily News maintains that Attorney Rohn's representation of Jones is in violation of Rules 1.7 and 4.2 of the American Bar

2. The Court does not consider Daily News' lengthy iteration of Attorney Rohn's past other cases except to the extent that the cited cases of *Saldana v. Banco Popular*, D.Ct. Civ. 1996/1 and *Encarnacion v. Kmart*, D.Ct. Civ. 1997/63 are germane hereto.

Association's Model Rules of Professional Conduct.³ Daily News argues that Jones was Gross' superior and had direct involvement in the decision to terminate Gross and that by representing Jones before and after undertaking representation of Gross (concerning Gross' termination) Attorney Rohn has incurred an impermissible conflict of interest.⁴

In his opposition to the motion, Jones asserts that he did

3. The ABA Model Rules have been adopted by the Virgin Islands. See LRCi 83.2(a)(1); *V.I. Bar Association v. Boyd-Richards*, 26 V.I. 299 (D.V.I. 1991).

4. Daily News cites the December 8, 2000 Order of Territorial Court Judge Edgar D. Ross in *Gross v. ICC et al.*, Terr. Ct. Civ. 376/99. Jones states that such Order was rescinded by Judge Ross and Daily News does not contend otherwise in its reply. Per Judge Ross, the December 8, 2000 Order has not been rescinded. That Order granted Plaintiff's Motion to Quash a subpoena duces tecum issued to Attorney Rohn and issued a Protective Order with regard to Attorney Rohn's testimony. The Order noted that,

"Moreover, it appears that Attorney Rohn has created an inherent conflict by choosing to represent Will Jones and Andy Gross in separate actions against Daily News Publishing Co., Inc. Since, Will Jones as a part of management and was directly involved in the termination of Andy Gross, it is apparent that Will Jones may be the principal actor/witness for the corporate defendant. Thus, Andy Gross and Will Jones have adverse interests.

Pursuant to ABA Model Rule 1.7, if a conflict of interest is apparent before the lawyer takes the case, the lawyer should not accept representation. If the conflict becomes apparent after representation has begun, then the lawyer should withdraw representation."

Although not precedential, Judge Ross' reasoning appears valid. Plaintiff does not dispute Daily News' assertion that subsequent to Judge Ross' Order, Attorney Rohn has continued to represent Gross in that matter.

not consider himself to be Gross' supervisor; that he did not agree with much of the contents of the letter of termination of Gross which was dictated to him; and that Jones voiced such objections. Plaintiff concludes that, "...Jones is simply a fact witness in the Gross matter and is not involved as Gross' supervisor, or the decision-maker with respect to the Gross termination. Gross plays no role whatsoever in Jones' lawsuit.." In support thereof, Jones cites to deposition testimony given by him in the Gross case on December 13, 2000. Plaintiff does not offer that Attorney Rohn will discontinue representation of Gross.

In its reply, Daily News emphasizes that Jones was employed as Acting City Editor for the Daily News and that while so employed Attorney Rohn had impermissible discussions with him concerning Gross. Daily News also provided the following exhibits:

1. Exhibit A

The May 14, 1999 letter assigning Jones to the position of Acting City Editor and defining his duties which included supervision and assignments to all news reporters (such as Gross).

2. Exhibit B

Attorney Rohn's letter to Jeffrey Prosser dated February 26, 1999 setting out Rohn's representation of Jones' discrimination claims (and including a copy of Jones' EEOC discrimination complaint and Jones' February 26, 1999 affidavit with regard thereto).

3. Exhibit C

_____ Jones' February 26, 1999 letter to Gross terminating Gross' employment with the Daily News.

4. Exhibit D

_____ Jones' July 2, 1999 affidavit detailing his involvement in the investigation and termination of Gross.

Upon review of the documents submitted by the parties, it is clear that at material times herein, Jones had at least some supervisory responsibility over Gross; that Jones performed significant functions concerning the investigation of Gross' conduct; that Jones had a material role in the decision making process and ultimate termination of Gross; and that Jones will undoubtedly be an important witness in the Gross case. The fact that Jones' December 13, 2000 deposition testimony diminishes his role with regard to Gross only highlights the Daily News' concern that at the time of such deposition, Jones was represented by Gross' attorney. The Court need not now decide whether Jones

was, in fact, a major or lesser factor in the Gross affair as it is only material for purpose hereof that Jones' involvement therein was significant and will be fairly at issue.

Regarding ABA Model Rule 1.7

Rule 1.7 provides:

CONFLICT OF INTEREST: GENERAL RULE

a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

The Disciplinary Rules of the Model Code of Professional Responsibility requires an attorney to decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the proffered employment or if it would be likely to involve him in representing differing interests.

DR5-105(A) .

Daily News has asserted a conflict because of Attorney Rohn's representation of its managerial employee (Jones) prior to

and during her representation of Gross in a matter which Jones had significant factual involvement. Traditionally, Jones may have the sole right to consent to his attorney representing another party, however, Daily News as Jones' employer (and later former employer) has a valid pecuniary interest in a suit in which Jones is an embodiment of its corporate presence. This is not unlike a situation where an attorney sues a current client on behalf of another party arising from an automobile accident. The current client, (fully insured) may not object to being sued, however, the actual pecuniary interest in such litigation belongs to the insurer. Although Jones is not a named Defendant in Gross' suit, the principle that the right to object should belong to the one at risk (Daily News) is analogous.⁵

Daily News is entitled to the testimony of its former manager, Jones, (with regard to the Gross litigation) unencumbered by the untrammelled access of Gross' attorney to such witness. Attorney Rohn has continued as counsel for Gross

5. It was so ruled with equivalent language in the order granting motion to disqualify dated May 31, 1996 in *Eulalie Saldana v. Banco Popular de Puerto Rico*, STX. Civ. 1996/1.

In *Saldana*, the court found that it presented a conflict of interest for Saldana's attorney to represent her in a suit against Banco Popular while also representing Ms. Dariel Ruiz, an officer of Banco Popular in an unrelated case, because Ms. Ruiz played a significant role and was a likely witness in the *Saldana* matter.

subsequent to notice of such conflict (i.e. Judge Ross' December 8, 2000 Order) On the particular facts herein, there is sufficient conflict of interest to warrant disqualification for such reason.

Regarding ABA Model Rule 4.2

_____Rule 4.2 provides:

_____COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment (4) to Model Rule 4.2 provides:

[4] In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

In this matter, Attorney Rohn commenced representation of Jones prior to her representation of Gross. Attorney Rohn represented Jones when Gross was fired on June 6, 1999 and when she filed suit on behalf of Gross in the Territorial Court on June 24, 1999. Attorney Rohn has had open access to discuss with Jones the substance of the Gross case and Plaintiff has not

denied Daily News' assertion that such contact took place.⁶ In any event, Attorney Rohn was counsel of record for Jones when he was deposed in the Gross case on December 13, 2000.

By unpublished Order dated November 14, 2000 in *Idealfonso "Pancho" Encarnacion v. Kmart Corp.*, STX Civ. 1997/63, Chief Judge Finch ordered disqualification of Plaintiff's attorney for having communication with Kmart's employee concerning the matters at issue (citing *Inorganic Coating, Inc. v. Falberg*, 926 F.Supp. 517, 520 (E.D.Pa. 1995), "...disqualification is required where the substance of the *ex parte* discussion went to the nub of the lawsuit..." and *Faison v. Thornton*, 863 F.Supp. 1204, 1217 (D.Nev. 1993)).

At the time of Jones' deposition in Gross' case, Jones was no longer employed by Daily News. The Standing Committee on the Rules of Professional Responsibility had taken the position that Rule 4.2 does not apply to former employees. A majority of the courts adhered to this view. However, the committee conceded that "the concerns reflected in the Comment to Rule 4.2 may

6. As noted by Daily News, it attempted to depose Attorney Rohn regarding her conversations with Jones about Gross but was ordered not to do so (see Judge Ross Order dated December 8, 2000, Exhibit "A" to Daily News' motion). Daily News' requests that the Court infer that such conversations in fact occurred. (Daily News Motion to Disqualify at ftn.12, p.17).

survive the termination of the employment relationship" and that "persuasive policy arguments can be and have been made for extending the ambit of [the Rule] to cover some former corporate employees."

The Comment to the rule defines a "corporate party" as:

- (1) persons having a managerial responsibility on behalf of the organization;
- (2) any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or;
- (3) any person whose statement may constitute an admission on the part of the organization.

In *Curley v. Cumberland Farms*, 134 F.R.D. 77, 82 (D.N.J. 1991), the court reasoned that imputation should be examined on a case by case basis and cautioned against claims of imputation which were hypothetical and remote.

Subsequently, the American Bar Association's committee on Ethics and Professional Responsibility issued a formal opinion that ostensibly clarified that Rule 4.2 does not apply to former employees. A.B.A. Formal Op. 91-359 (1991). Notwithstanding such opinion a number of courts in our circuit have continued to recognize the viability of inquiry into the particular status of

such former employees as relevant.

In *Goff v. Wheaton Industries*, 145 F.R.D. 351, 356 (D.N.J. 1992), the court cited *Curley v. Cumberland Farms*' holding that the corporation could present facts indicating that if a former employee,

...(1) had managerial responsibilities; (2) could impute liability on the corporation; or (3) could make statements which could constitute an admission on the party of the organization then Rule 4.2 would afford party-like status to the former employee and forbid *ex parte* communication....,

noting that that decision "**offers guidance in directing an analysis of Rule 4.2's application...**" [emphasis added).

Recognizing that there are inconsistent decisions in this area, D.J. Kelly stated,

If there is a real or perceived risk of disclosure of confidential information protected by the privilege which is or may be damaging to the party in interest due process considerations may prohibit *ex parte* contact by adverse counsel with a current or former employee.

Stabilus v. Haynsworth, 1992 WL 68563 (E.D.Pa.). See also, *Dillon Companies, Inc. v. Sico Co.*, 1993 WL 492746 (E.D.Pa.); *Marinnie v. Nabisco Brands, Inc.*, 1993 WL 267453 (E.D. Pa.); *Police Officer Joy Carter-Herman et al. v. City of Philadelphia et al.*, 897 F.Supp. 899, 902 (E.D. Pa. 1995); *In Re: The Prudential Ins. Co. of America Sales Practice Litigation*, 911

F.Supp. 148, 153 (D.N.J. 1995); *Michaels v. Woodland*, 988 F.Supp. 468 (D.N.J. 1997).

It is readily apparent from a review of Jones December 13, 2000 deposition (Exhibit "1" to Plaintiff's opposition) that the emphasis of Jones' testimony is divergent from that suggested by Daily News' reply Exhibits "A", "C", and "D," with regard to Jones' authority over Gross; Jones' participation in the investigation, decision making process and ultimate firing of Gross; and the underlying facts of the Gross affair. Jones also participated in confidential communications concerning Gross with Daily News' attorney and Executive Editor Lowe Davis (Exhibit "D" to Daily News' reply). Attorney Rohn has continued to represent Gross in the Territorial Court case.

Although the extent of Jones' managerial responsibilities is fairly at issue, it is beyond dispute that Jones' testimony concerning Gross goes to the heart of Gross' suit and that the continued representation of Jones by Gross' attorney is violative of Model Rule 4.2.

Accordingly, for reasons above stated, it is hereby;

ORDERED as follows:

1. Daily News' motion is GRANTED and the Law Offices of Lee J. Rohn is disqualified as Plaintiff's counsel.

2. This Order and all further action in this matter are STAYED pending any appeal to the District Judge.
3. Further to ruling on such appeal, if then appropriate, the Court will provide for appearance of new counsel and revised scheduling.

ENTER:

Dated: March 16, 2001

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By: _____
Deputy Clerk